**TAN CHONG MOTOR HOLDINGS BHD**

**v.**

**MENTERI SUMBER MANUSIA, MALAYSIA & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM JC
[APPLICATION NO: R2-25-13-03]
29 JUNE 2004

***LABOUR LAW:*** *Industrial Court - Jurisdiction - Reference of dispute by Minister under s. 20(1) Industrial Relations Act 1967 - Whether Minister correct in making reference - Whether duty to decide threshold jurisdiction of Industrial Court lies solely with Minister - Whether Minister's failure to decide an error of law*

***ADMINISTRATIVE LAW:*** *Remedies - Certiorari, application for - To quash decision of Minister to refer dispute to Industrial Court - Whether Minister correct in making reference - Whether duty to decide threshold jurisdiction of Industrial Court lies solely with Minister - Whether Minister's failure to decide an error of law*

This was an application by the applicant pursuant to O. 53 r. 3 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the 1st respondent (the Minister of Human Resources) for referring the 2nd respondent's representation under s. 20(1) of the Industrial Relations Act 1967 ('the Act') to the 3rd respondent (the Industrial Court). The applicant also sought a prohibition order restraining the 3rd respondent from hearing the said representation. The main issue requiring determination was whether the 1st respondent had acted in excess of his powers and was correct in making the reference to the 3rd respondent. The 1st respondent averred that the decision to refer the 2nd respondent's representation to the Industrial Court was correct since there was a mixed question of fact and law in determining whether a particular claimant was a "workman" or otherwise. It was submitted that the Minister had no authority to decide on such an issue since he would be exceeding his jurisdiction under s. 20 of the Act. The applicant, however, contended that the duty to decide the issue of the threshold jurisdiction *ie*, the requisite jurisdiction to enter into the inquiry, of the Industrial Court lay solely with the 1st respondent and that the 1st respondent's decision not to determine the said issue constituted an error of law.

**Held (allowing the application):**

**[1]** In this case, the 1st respondent had a duty in law to consider the issue of the threshold jurisdiction of the Industrial Court. Any challenge to the threshold jurisdiction must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court. As such, when a party challenges the threshold jurisdiction under s. 20 of the Act, it is the Minister who must decide on the issue, and the test that should be properly applied is whether the Minister had acted lawfully in coming to his decision. In the instant case, the Minister had failed to decide the specific question of threshold jurisdiction posed to him as to whether the 2nd respondent was a "workman" within the Act, and further, misdirected himself in law on the threshold issue. The Minister's decision not to determine the threshold jurisdiction issue constituted, in law, an outright refusal to consider a relevant matter and was liable to be quashed.

**Case(s) referred to:**
*Assunta Hospital v. Dr A Dutt [1980] 1 MLJ 96 HC* ***(refd)***
*Chong Kim Sang v. Metatrade Sdn Bhd [2004] 2 CLJ 439 CA* ***(dist)***
*Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 FC* ***(refd)***
*Enesty Sdn Bhd v. Transport Workers Union & Anor [1986] 1 MLJ 18* ***(refd)***
*John Hancock Life Insurance (Malaysia) Bhd v. Menteri Sumber Manusia Malaysia & Ors* ***(foll)***
*Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor [1997] 1 CLJ 665 CA* ***(refd)***
*Kathiravelu Ganesan v. Kojasa Holdings Bhd [1997] 3 CLJ 777* ***(foll)***
*Padfield v. Minister of Agriculture, Fisheries and Food & Ors [1968] AC 694* ***(foll)***
*Stephen Andrew Brown & Ors v. Menteri Sumber Manusia Malaysia & Anor [2003] 6 MLJ 249* ***(refd)***

**Legislation referred to:**
Companies Act 1965, s. 129(6)
Industrial Relations Act 1967, ss. 2, 20(1), (3)
Rules of the High Court 1980, O. 53 r. 3

*For the applicant - Romesh Abraham (Mazura Kamaludin); M/s Shook Lin & Bok*
*For the 1st respondent - Hasila Awang FC*
*For the 2nd respondent - N Sivabalah (Raymond TC Low); M/s Shearn Delamore & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Wan Afrah Ibrahim JC:**

**Application**

This is an application pursuant to O. 53 r. 3 of the Rules of the High Court 1980 as set out in the applicant's notice of motion for an order of *certiorari* to quash the decision of the 1st respondent (the honourable Minister of Human Resources) dated 26 December 2002 for referring the 2nd respondent's (Dato' Tan Kim Hor) representation under s. 20(1) of the Industrial Relations Act 1967 ("the Act") to the 3rd respondent (the Industrial Court). The applicant is also seeking a prohibition order restraining the 3rd respondent from hearing the said representation.

**Facts**

The relevant facts giving rise to this application are:

The applicant's affidavit affirmed by one Dato' Haji Kamaruddin @ Abas bin Nordin stated that the 2nd respondent had since the incorporation of the applicant company in October 1972, held a number of positions ie, Deputy Chairman, Deputy Managing Director, and between October 1985 to May 2002 Chairman of the Board of Directors. By reason of the provisions of s. 129(6) of the Companies Act 1965, the 2rd respondent failed to garner the requisite number of votes from the shareholders to be reappointed as Director at the Annual General Meeting ("AGM") of the applicant held on 29 May 2002.

Consequent to the AGM, by letter dated 3 July 2002, the applicant informed the 2nd respondent that his term of office as Chairman had expired and he was notified that the salary payments as well as other benefits made available to him ceased effective 29 May 2002.

The 2nd respondent in his letter addressed to the applicant dated 12 July 2002 claimed that he had been dismissed without just cause or excuse. In reply by letter dated 25 July 2002 the applicant wrote to disagree with the 2nd respondent's contentions. Thereupon, the 2nd respondent lodged a complaint under s. 20(3) of the Industrial Relations Act. Conciliation proceedings were then convened at the Industrial Relations Department. At the said conciliation proceedings, the applicant argued that the 2nd respondent was not a "workman" within the meaning of the said Act and that there ought not be any reference of the 2nd respondent's complaint to the Industrial Court. However the Director-General of Industrial Relations referred the disputed case to the 1st respondent who then referred the 2nd respondent's representation to the Industrial Court, which eventually led to the instant application by the applicant.

**ISSUE – Whether The 1st Respondent (Minister) Acted In Excess Of His Powers And Was Correct To Make The Reference To The Industrial Court**

Applicant submitted that before the Industrial Court could hear a reference for dismissal without just cause or excuse under s. 20 of the said Act, it must possess the requisite jurisdiction to enter and hear such a reference. Unless the Industrial Court possesses the requisite jurisdiction to enter into the inquiry ie, commonly referred to as "threshold jurisdiction", it may not enter and hear the reference as to do so would exceed its jurisdiction under the said Act. The applicant submitted that the duty to decide the issue of threshold jurisdiction of the Industrial Court lies solely with the 1st respondent, referring to the Supreme Court decision in *Kathiravelu Ganesan v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 which held that:

> But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings.
>
> Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to. The Industrial Court is therefore empowered to take cognizance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction.
>
> Once it is seized of the dispute in the threshold sense, the Industrial Court, unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as 'the jurisdiction to decide whether there is jurisdiction'.

Having established the above, counsel for the applicant further submitted that it follows from the decision of the Supreme Court in *Kathiravelu* that any challenge to the threshold jurisdiction of the Industrial Court must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court and not otherwise. Where a party challenges the threshold jurisdiction of the Industrial Court, the duty to decide such a question is cumbersome on the 1st respondent and not the Industrial Court. Also where the 1st respondent, in carrying out that duty either wrongly decides the threshold jurisdiction question or fails to decide such question properly or at all, his decision may be, quashed in judicial review proceeding in the High Court as enumerated in the Supreme Court decision in *Kathiravelu*:

It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

The applicant submitted that in determining whether the 1st respondent has correctly decided the issue of threshold jurisdiction, the test to be applied is whether the 1st respondent acted "lawfully" in coming to his decision. If the 1st respondent had, in employing his discretion under s. 20 of the said Act, acted unlawfully or exceeded his jurisdiction, his decision was liable to be quashed by the court. This is evident in the House of Lord's decision in *Padfield v. Minister of Agriculture, Fisheries and Food & Ors* [1968] AC 694 where the Minister's powers and court's right to intervene were explained in the following manner:

So it is clear that the minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.

My Lords, on the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case. The minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully. Unlawful behaviour by the minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker CJ in the divisional court): (a) by an outright refusal to consider the relevant matter or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration. There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately, it becomes a question whether for one reason or another the minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings which I have mentioned.

In summary, counsel for the applicant reiterated and submitted that where the 1st respondent in declining to determine whether the 2nd respondent was a "workman" or not, committed an error of law and in particular failed to act in accordance with the principles set out in *Kathiravelu*. Further, the 1st respondent's decision not to determine the issue of threshold jurisdiction, constituted, in law, an "outright refusal to consider a relevant matter" within the meaning of the decision in *Padfield* and is, accordingly, liable to be quashed. In support of the applicant's contentions, counsel for the applicant referred to the more recent decision of *John Hancock Life Insurance (Malaysia) Berhad v. Menteri Sumber Manusia Malaysia & 2 Others* where the High Court allowed a similar application to quash the decision of the Minister to refer a representation under s. 20 of the said Act to the Industrial Court.

On the other hand, counsel for the 1st respondent contended that the Minister was correct in referring the 2nd respondent's representation to the Industrial Court when there was a mixed question of fact and law to determine whether a particular claimant was a workman or otherwise. Accordingly reference was made to the case of *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 wherein the Federal Court held as follows:

> ... a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract of service or for services.

Pertaining to the threshold jurisdiction of the Industrial Court, counsel for the 1st respondent submitted that the Minister has no authority to decide on such an issue as he (the Minister) would be exceeding his jurisdiction under s. 20 of Act 177. Both counsel acting for the first and second respondents respectively submitted that the ratio of the Supreme Court's decision is that threshold jurisdiction issues should not be raised as a preliminary objection in the Industrial Court. In fact, both counsel contended that it was never decided by the Supreme Court in *Kathiravelu* that the Minister was possessed of the power or duty to decide on the issue of threshold jurisdiction before the Industrial Court could proceed to hear the case on its merits. It was therefore submitted that the applicant had misconstrued and misapplied the *Kathiravelu*'s case. Mr. Sivabalah, counsel for the 2nd respondent further submitted that the Supreme Court acknowledged that the Industrial Court could consider the threshold jurisdictional issue, but added that it should be heard only after the full hearing of the trial rather than on a preliminary objection. This is evident from what was held by Supreme Court at p. 699.

> where a challenge is not then taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extraterritorial jurisdiction.

From the above passage, learned counsel for the second respondent argued that the Supreme Court expressly acknowledged that the workman issue was a matter which could, and ought to be dealt with by the Industrial Court. To support his argument he referred to the case of *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1986] 1 MLJ 18 wherein the Supreme Court held that:

> Thus merely because the Industrial Court has been proven to have jurisdiction to hear a reference does not mean that an aggrieved party is shut off from contending subsequently that the tribunal has acted without or in excess of jurisdiction when making its award. The decision of the Federal Court in the first appeal is not intended and is no authority for the proposition that once a reference is made by the Minister, say under section 20(3), conferring the Industrial Court jurisdiction to enter into an inquiry over a dispute, such jurisdiction to must be taken to include a decision that the aggrieved party is a "workman" within the meaning of the Act. It may well be and probably it can even be taken for granted that the Minister in exercising his discretion merely assumes that the aggrieved party is a "workman" since the question whether a person is a workman under the Act is one of mixed law and fact which can only be properly determined after due inquiry by the Industrial Court depending on the circumstances of each case.

It was further submitted before the court that the 1st respondent had no duty to decide on the aforesaid threshold jurisdictional question. In fact, based on the material placed before the 1st respondent, it would be impossible for the 1st respondent to decide on the questions of law and fact arising from the 2nd respondent's representations. The 1st respondent acts on the representation made by parties at the conciliation meeting. There was insufficient material for the 1st respondent to decide on the issue of threshold jurisdiction, which represents a mixed question of law and fact. Mr Sivabalah again referred to the case of *Assunta Hospital v. Dr A Dutt* [1980] 1 MLJ 96 where Azmi J held as follows:

> In my judgment, there is no provision in the Industrial Relations Act where the Industrial Court can disregard a decision made by the Minister under s. 20(3) of the Act. That section gives unfettered discretion to the Minister and the exercise of that discretion has not been specifically challenged in the notice of motion. The Minister is not obliged to state the grounds on which the discretion has been exercised. It might well be that he is unable to decide whether Dr Dutt is or is not a workman under s. 20(1).

His Lordship also held that once a dispute has been referred by the Minister, it is for the Industrial Court to deal with the issue of whether the applicant was a workman, as follows:

> I am therefore, of the view that whatever may be the rights of the parties, once the case is referred to the Industrial Court, it is for the Industrial Court to decide, *inter alia*, whether Dr Dutt is a 'workman' within the meaning of s. 20(1). If he is a workman, the court must decide whether he has been dismissed without just cause or reason.

Similarly counsel referred to *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor* [1997] 1 CLJ 665 which held that upon finding that there are serious questions of law and fact that requiring adjudication, then it becomes incumbent upon the Minister to refer the dispute to the Industrial Court for an award.

Both counsel for the respondent disagreed with the High Court's decision in *John Hancock* as relied on by the applicant on the premise that the decision was erroneous and was pending appeal to the Court of Appeal.

**Decision**

In this case, I have no hesitation to hold that the 1st respondent has a duty in law to consider the issue of threshold jurisdiction of the Industrial Court. This issue was also been decided in *John Hancock Life Insurance (Malaysia) Berhad v. Menteri Sumber Manusia*, in which Faiza J took the stand that the duty to decide threshold jurisdiction lies solely upon the Minister. His decision was based on the interpretation of *Kathiravelu*. I find no reason why I should decide otherwise. I am inclined to agree with the learned judge that a reading of *Kathiravelu*'s case would mean that any challenge of the threshold jurisdiction of the Industrial Court must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court.

As such I am of the view that when questions of threshold jurisdiction are raised by a party under s. 20 of the said Act, the Minister must specifically address and decide the questions and such a decision must be correct in law.

I also take note that in *Karthiravelu*'s case, it was held that:

> where a challenge is not then taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extraterritorial jurisdiction.

It is therefore clear from the foregoing that the question of allowing the Industrial Court to deal with the "workman" issue will only arise if no challenge is taken to that Minister's reference.

In the instant case, the Minister failed to decide the specific question of threshold jurisdiction posed to him as whether the second respondent was a "workman" within the Act and further, misdirected himself in law on the threshold issue.

I noted, the Minister in his submission has taken the stand that he has no authority to decide on the threshold jurisdiction of the Industrial Court as he would be exceeding his jurisdiction under s. 20 of the Act. I refer also to the case of *Stephen Andrew Brown & Ors v. Menteri Sumber Manusia Malaysia & Anor* [2003] 6 MLJ 249 in which Raus Sharif J held as follows:

> The Minister has a clear discretion whether to make a reference or not. The contention by the applicant that the minister acts in a purely administrative capacity and not entitled to adjudicate on the matter is devoid of any merit. To accept such a contention would put the position of the minister *vis-a-vis* the Act is an intermediary or a mere postman. That is not the intention of the Act.

It is also apparent in this case that a challenge to the 1st respondent's power of reference has been taken by the applicant. A perusal of 1st respondent's affidavit does not indicate why he rejected the applicant's challenge and no reasons were given by the minister why the specific written representation of the applicant on the 2nd respondent's role has been wholly disregarded.

As I have said earlier, the Minister is under a duty to decide the question of threshold jurisdiction and in deciding whether the minister correctly decided the issue of threshold jurisdiction, the test that should be properly applied is to whether the Minister acted lawfully in coming to his decision.

However in this case it would be noted that para. 13 & 15 of the 1st respondent's affidavit, the Minister has taken the stand that in view of the dispute of law and fact on this issue, ie, whether the 2nd respondent was a workman within the Act, he was unable to determine the same and accordingly decided to refer the representation to the Industrial Court for a decision. It is my opinion that by doing so, the Minister misdirected himself in law and decision so made is liable to be questioned as he must determine the threshold jurisdiction issue when a challenge is taken. I would also agree with learned counsel for the applicant that the Minister's decision not to determine the threshold jurisdiction issue constitutes, in law, an outright refusal to consider a relevant matter within the meaning of the decision in *Padfield* and is liable to be quashed.

It is pertinent to note subsequent to the oral submission before me, counsel for the 2nd respondent forwarded to me the recent Court of Appeal decision in *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439. In that case, it was decided that an executive director was also an employee under s. 2 of the Industrial Relations Act 1967. Counsel also highlighted to me that in the said case, the Court of Appeal also referred to *Kathiravelu*'s case. To me *Metatrade* can be distinguished from the case before me as it does not relate to a challenge of the Minister's reference under s. 20 of the Industrial Relations Act 1967.

As such, I am more inclined to agree with the applicant's counsel that the application of *Metatrade*'s case would be more restrictive.

**Conclusion**

Based on my findings above, the Minister failed to decide the specific question of threshold jurisdiction posed to him, further misdirected himself in law for refusing to consider a relevant matter. For these reasons, I granted an order in terms of (1) & (2) and costs of the application.